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IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1971

NO. 71-36

STATE OF CALIFORNIA, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, et al.

Appellants,

vs.

ROBERT LA RUE, et al.,

Appellees.

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

MOTION TO AFFIRM OR DISMISS

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MOTION TO AFFIRM OR DISMISS

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the appeal filed herein be dismissed and that the final judgment of the District Court for the Central District of California be affirmed on the grounds that the case does not present any substantial federal questions.

STATEMENT OF THE CASE

In addition to the statement of facts set forth in appellant's jurisdictional statement, appellees would call the court's attention to certain stipulations contained in the pre-trial order filed with the District Court. In the pre-trial order, all parties stipulated to the following facts:

> "(c) The licensee plaintiffs were and now are doing business within the State of California, and are holders of on-sale Alcoholic beverage licenses issued by the defendants.
>
> "(d) The non-licensee plaintiffs were and now are employed as dancers within the State of California at on-sale alcoholic beverages premises of some of the licensee plaintiffs.
>
> "(e) The defendant DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL is a department and agency of the State of California and was and is established by the

Constitution of the State of California. The defendant EDWARD J. KIRBY is the Director of said Department.

"(f) The defendants enacted Department Rules 143.2, 143.3, 143.4, 143.5, which were filed with the Secretary of State of the State of California and became effective on August 10, 1970. The Rules apply statewide and have the effect of state law. Said Rules are promulgated as Sections 143.2, 143.3, 143.4 and 143.5 of Title 4 of the California Administrative Code.

"(g) All of the licensee plaintiffs offer entertainment, including dancing on a stage before the patrons, on their licensed alcoholic beverage premises. The non-licensee plaintiffs perform dances on a stage before the patrons, at the licensed beverages premises. During the course of such

dances, acts or conduct occur which fall within the proscribed acts and conduct set forth in Department Rule 143.3.

"(h) The MAC LEAN plaintiffs present at their licensed premises films, still pictures and visual reproductions which depict, among other things, the prohibited acts enumerated in Rule 143.4.

"...

"(j) All of the licensee plaintiffs' premises are open to the public.

"(k) The defendants intend to and will take disciplinary action against the alcoholic beverage licenses of licensees violating Department Rules 143.2, 143.3, 143.4 and 143.5.

"(l) Plaintiffs will suffer irreparable injury if their on-sale alcoholic beverage licenses are suspended or revoked.

"(m) An actual controversy

exists between the parties and the parties desire a declaration of their rights with respect to the constitutionality of the Department Rules in question."

In addition, certain facts were not admitted by appellant, but appellant did not contest the facts by evidence to the contrary. The facts were as follows:

"(b) Plaintiff licensees:

"(i) prohibit the attendance of minors, and cause the entrances of their premises to be policed to assure the non-entrance of minors; and

"(ii) post conspicuous signs at the entrances which read as follows: 'IF YOU WOULD BE OFFENDED BY NUDE ENTERTAINMENT DO NOT COME IN', and 'WARNING, THIS ESTABLISHMENT OFFERS NUDE ENTERTAINMENT. IF YOU WOULD BE OFFENDED DO

NOT ENTER'; and

"(iv) display signs and advertisements which convey only, normal description of the entertainment, e.g., 'Nude Entertainment'."

Questions Presented.

1. The question is whether a State can constitutionally proscribe certain specified "free speech" and "expression" under all circumstances because it occurs in connection with the State's Twenty-First Amendment rights; i.e: the sale and consumption of alcoholic beverages.

2. Are there two "free speech" standards, one in a barroom and the other outside the barroom?

3. Does the United States v. O'Brien, 391 U.S. 367 (1968) allow the State of California to disregard the First Amendment inside alcoholic beverage establishments under the guise of the Twenty-First Amendment on the theory that the result of the mixture of alcohol and men gives rise to more important governmental

interests than sober men in a theatre or bookstore.

I

THE FIRST AMENDMENT PROHIBITS DIRECT PROSCRIPTIONS OF THE SEXUAL CONTENT OF "SPEECH" WHEN SUCH SPEECH IS NOT OBSCENE.

A. California Department of Alcoholic Beverage Control Department Rules 143.3 and 143.4 Directly Restrict the Content of Speech.

The Department contends that Rules 143.3 and 143.4, which are the subject of this proceeding, are not concerned with speech in any form, but are concerned only with the prohibition of certain so-called non-verbal acts.

Rule 143.4 directly prohibits the "showing of film, still pictures, electronic reproductions or other visual reproductions" which contain actual or simulated depictions of specified sexual

activities or specified portions of the human anatomy. Thus, the Department apparently asserts the proposition that the exhibition of motion pictures, still pictures (including, presumably, photographs, paintings and drawings), electronic reproductions (relevision, video-tape, holograms), and other visual reproductions (statues, carvings, assemblages) do not come within the First Amendment. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Jacobellis v. Ohio, 378 U.S. 184 (1964).

Rule 143.3 is entitled "Entertainers and Conduct". It expressly provides that "Live entertainment is permitted on any licensed premises, except that" such entertainment may not include depictions of specified sexual acts or portions of the human anatomy, whether such depictions are real or simulated. Live entertainment is also within the First Amendment. Schacht v. United States, 398 U.S. 58 (1970); In re Giannini, 69 Cal.2d 563 (1968).

Thus, the Department's rules do not merely proscribe certain conduct in the

abstract but are expressly framed to restrict the content of recognized forms of speech and expression under the First Amendment. They proscribe certain protected speech under all circumstances if the conduct occurs on a licensed premises.

B. The Rules Restrict the Sexual Content of Speech Which is Not Obscene

The District Court correctly held that the Rules in question are unconstitutional because they expressly require the exclusion of specified matters from First Amendment expression without regard to the context in which the depiction is presented and without regard to whether the specified acts when considered in context are patently offensive and are utterly without redeeming social value taking the conduct as a whole. Roth v. United States, 354 U.S. 476 (1-57); Memoirs v. Massachusetts, 383 U.S. 418 (1966); United States v. Reidel, 39 USLW 4523

(1971). In short, the Rules totally ignore the concept of obscenity. These rules would prohibit, for example, the exhibition of the many motion pictures in general circulation which contain scenes of nudity and simulation of sexual intercourse. Rule 143.4 would prohibit the exhibition of unquestioned works of art, running the gamut from Picasso nudes to Greek statues sans fig leaves. Thus, the rules improperly censor non-obscene speech. NAACP v. Button, 371 U.S. 415 (1963). Ironically, they would prohibit the showing of films on premises where only persons over the age of twenty-one could be present while the same film could be shown in a theatre where persons under the age of twenty-one were allowed.

As one of the questions presented, appellant asks if the First Amendment protects any and all non-verbal conduct depicted in live entertainment or film. This is not the proper question. The Rules are invalid not because all acts within their scope are necessarily protected by the First Amendment, but

because some acts within their scope may be. Such overbreadth is sufficient to establish an unconstitutional restraint on free expression. Shelton v. Tucker, 364 U.S. 479.

II

THE DEPARTMENT'S RULES CANNOT BE JUSTIFIED AS A VALID INCIDENTAL REGULATION OF THE SALE AND CONSUMPTION OF ALCOHOLIC BEVERAGES.

A. The Rules Do Not Meet the Criteria of United States v. O'Brien.

Appellant incorrectly asserts that Rules 143.3 and 143.4 satisfy the requirement set forth in the following passage from United States v. O'Brien, 391 U.S. 367, 376-377 (1968):

> "This Court has held that when 'speech' and 'non-speech' elements are combined in the same course of conduct, a

> sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment Freedoms. ...we think it clear that a governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

Rules 143.3 and 143.4 fail to meet the O'Brien criteria for the following reasons:

1. This is not a case where speech and non-speech elements are combined;

the rules deal directly with speech alone in the form of exhibitions of motion pictures, plays and dancing. Therefore, the regulations are not incidental.

2. The rules directly suppress free expression and are therefore not incidental.

3. The restrictions on free expression are greater than necessary. Most of the evils are already prohibited by valid laws. There is no showing that such broad rules are necessary to achieve the desired results. Butler v. Michigan, 352 U.S. 350 (1956); Coates v. Cincinnati, 402 U.S. 611 (1971).

The Department's rules censor the content of speech for the purpose of controlling the evils that allegedly follow from such communication. The Department cannot escape the limitations of the obscenity standard by calling the rules incidental.

B. The State Does Not Have Greater Powers of Regulation Because Alcoholic Beverages are Involved.

1. The Twenty-First Amendment is not Involved.

Appellant cannot claim that the Rules in question derive from the Twenty-First Amendment since there is nothing in the rules that concern interstate commerce in alcoholic beverages. Hostetter v. Bon Voyage Liquor Corp., 377 U.S. 324 (1964); Sail'er Inn, Inc. v. Kirby, 5 Cal.3d 1 (1971).

2. The State's Police Power Over Alcoholic Beverages Does Not Justify These Rules.

The Rules cannot be justified as an exercise of the police power of the

state to control the use of alcoholic beverages. Whatever the scope of that power might be, it is necessarily governed by the overriding provisions of the First Amendment. Moreover, the Department asserts here not its authority over alcoholic beverages, but its authority over public welfare and morals. Surely the State's power over public welfare and morals is not expanded by the involvement of alcoholic beverages to the extent that it may ignore otherwise applicable Constitutional safeguards. Wisconsin v. Constantineau, 400 U.S. 433 (1971).

The State may indeed have such broad power as to authorize it to prohibit the consumption of liquor altogether in public places. But, this power does not entitle it to condition the issuance or retention of licenses upon the licensees giving up their rights under the First Amendment.

III

THE DISTRICT COURT DID NOT INVALIDATE AND ENJOIN THE ENFORCEMENT OF AN OTHERWISE VALID STATE REGULATION BECAUSE IT MERELY ASSUMED THAT THE REGULATIONS WERE PROMPTED BY IMPROPER MOTIVES.

In its opinion the District Court said:

> "However, a fair reading of the transcript of the hearings requires the conclusion that the Department not only desires to prohibit sexual conduct between dancers and customers, but wanted to establish a set of rules which would circumvent the United States and California Supreme Court decisions relating to obscenity." LaRue v. State of California, Civil No. 70-1751-F, pgs. 7-8 of the Appendix to Appellant's Jurisdictional Statement.

Elsewhere, the District Court stated:

> "It is evident from a study of the transcripts of the public hearings that the Department enacted the Rules in an attempt to circumvent the obscenity laws, as well as to prohibit contact between dancers and customers." LaRue v. State of California, Civil No. 70-1751-F, Appendix to Appellant's Jurisdictional Statement, page 13.

Neither of the above excerpts from the opinion, nor anything else in the opinion, establish that the decision of the District Court was based upon an assumed improper motivation in the enactment of the Rules. On the contrary, the statements quoted above are reasonable deductions from the text of the Rules themselves. In any event, such conclusions are incidental and do not serve as the ultimate basis for the legal conclusions drawn by the Court.

Moreover, the statements quoted above were not the results of mere assumptions by the trial court. The statements constitute reasonable inferences from the administrative record which was supplied to the Court by Appellants and from the arguments presented to the District Court by Appellants.

Finally, we would observe that Appellant's arguments under III is based upon the proposition that the Rules are "otherwise valid". Since, as already established, the Rules are not otherwise valid, Appellant's argument is without merit.

CONCLUSION

For the reasons stated hereinabove, the issues raised by Appellant in its jurisdictional statement contain no substantial federal question. Therefore, the appeal should be dismissed and the decision of the District Court should be affirmed.

Respectfully submitted,

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